HOGAN & HARTSON L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

Writer's Direct Dial
(202) 637-5727

February 2, 1998

BY HAND DELIVERY

Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, CS Docket No. 97-248, RM No. 9097

Dear Ms. Salas:

GE American Communications, Inc., by its attorneys, hereby submits an original and 11 copies of its Comments on the Notice of Proposed Rulemaking issued December 18, 1997 in the above-referenced proceeding. Copies of these Comments also are being submitted by hand today to Internal Transcription Services, Inc. and, on paper and diskette, to Deborah Klein of the Cable Services Bureau.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,

Peter A. Rohrbach
Jennifer A. Purvis

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	CS Docket No. 97-248
Consumer Protection and Competition	)	
Act of 1992	)	RM No. 9097
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	
and Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS OF GE AMERICAN COMMUNICATIONS, INC.

Philip V. Otero
Senior Vice President and
General Counsel
GE American Communications, Inc.
Four Research Way
Princeton, NJ 08540

Peter A. Rohrbach
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

February 2, 1998

SUMMARY

GE American Communications, Inc. ("GE Americom") submits that the Commission should adjust its program access rules to achieve "technology neutrality" between satellite and terrestrial network facilities. The current program access rules distort the transmission market segment by irrationally imposing different obligations depending upon whether a given program service is distributed by satellite or over terrestrial networks. This "satellite penalty" was not intended by Congress and serves no useful purpose. The "satellite penalty" only interferes with the ability of a program distributor to choose the most efficient transmission technology available.

Significantly, the program access rules were "technology neutral" when originally adopted because all relevant program services were distributed by satellite. More recently, however, terrestrial network providers have begun touting their "exemption" from the access rules, and some programming is using terrestrial facilities that would have used satellites in the past. GE Americom is only asking that the "satellite penalty" be eliminated so that no transmission medium is favored by the access rules. The Commission has the statutory authority to bring its rules current with recent technological developments. It should do so here.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	CS Docket No. 97-248
Consumer Protection and Competition	)	
Act of 1992	)	RM No. 9097
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	
and Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS OF GE AMERICAN COMMUNICATIONS, INC.

GE American Communications, Inc. ("GE Americom"), by its attorneys, hereby submits its Comments on the *Notice of Proposed Rulemaking* ("*Notice*") issued December 18, 1997, in the above-captioned proceeding.

INTRODUCTION

GE Americom's interest in this proceeding is limited to one narrow but highly important issue raised in the *Notice*: the need for "technology neutrality" between satellite and terrestrial network facilities in applying the program access rules.

Currently the access rules contain an irrational penalty on the distribution of video programming by satellite. If a program distributor uses a satellite to transmit its program service to a cable head-end or consumer, then

program access rights and obligations may attach. 1/ In contrast, if the distributor uses fiber optic or terrestrial microwave facilities, program access does not apply.

As discussed in more detail below, this "satellite penalty" is completely unrelated to the purpose of Section 548 of the Communications Act. 2/ Congress had no intention to distort competition in the network facilities market by unfairly favoring terrestrial technologies. Congress was legislating with respect to program services, not transmission media. The "satellite penalty" is a relatively new anomaly arising from technology developments that were not contemplated when the Cable Act was adopted.

GE Americom emphasizes that it takes no position on the scope of the access rules. We recognize that programmers have a greater incentive to create new and diverse program services if they are not restricted as to how they choose to market those services to multichannel video program distributors ("MVPDs"). We also recognize that the Act contemplates that MVPDs have access rights to certain services.

Our concern is not which services should be subject to access obligations, and which should not. Either way, program distributors should be free to use the most efficient transmission mode -- be that satellite or terrestrial -- without affecting their program access position.

1/ *See* 47 C.F.R. § 76.1000 et seq. This assumes that the distributor is affiliated with a cable operator.

2/ 47 U.S.C. § 548.

We believe the Commission has the jurisdiction to eliminate the "satellite penalty" and bring common sense to the access rules. It should act now to make the program access rules "transmission technology neutral," and so prevent the satellite penalty (and its associated market distortions) from taking root.

I. THE SATELLITE PENALTY, AND THE MARKET DISTORTION IT CREATES, IS GROWING RAPIDLY.

The "satellite penalty" results from an irrational and unintended disconnect between the purposes of the program access rules and their current implementation. Section 19 of the 1992 Cable Act balances the varied public interests involved in program access by limiting the ability of programming vendors to restrict or deny access to certain program services, while preserving the right to enter into exclusive contracts in other cases. 3/ These policy considerations are what they are, and GE Americom takes no position in regard to them.

Importantly, however, these policy considerations have *nothing whatsoever* to do with the type of facilities or technology, satellite or terrestrial, used to transmit the programming. Furthermore, absolutely nothing in the history of the Act indicates that Congress intended to penalize satellite operators or benefit terrestrial facilities. Rather, the most that can be said is that Congress wrote

---

3/ 47 U.S.C. § 548(a) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market . . ."); *see also, e.g.*, Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 49-51 (1992) *reprinted in* 1992 U.S.C.C.A.N. 1231-33 ("*1992 Cable Act Conference Report*").

Section 19 at a time when all material cable program services were distributed by satellite. 4/ It therefore is not surprising to see references to satellites in the debates and language of that Section.

Put another way, when the 1992 Cable Act took effect, it was technology-neutral: the universe of program services it covered necessarily all were distributed by satellite. A year ago, the Commission noted complaints from some newer MVPD competitors that certain major program services had been, or soon would be, moved to terrestrial distribution, thereby avoiding the obligations of the program access rules. 5/ At that time, the Commission concluded that this problem had not developed to the point where regulatory action was necessary. 6/ However, the Commission acknowledged that programmers might "switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning access to programming," 7/ and stated that "if a trend of such conduct were to occur, [the Commission] would have to consider an appropriate response to ensure continued access to programming." 8/

4/ The only exceptions were a handful of locally-originated services typically running over a single system.

5 *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, 4434-35, ¶ 153 (1997) ("*1996 Cable Competition Report*").

6/ *Id.* at 1135, ¶ 154.

7/ *Id.*

8/ *Id.*

Since then additional evidence has arisen that terrestrial facilities providers are touting the "exemption" of their technology from the program access rules, and that programmers are using terrestrial links where they would in the past have used satellites. The sports channels in the greater New York and Philadelphia regions are the most well-known, in part because they drew particular attention in the comments filed in connection with the 1997 Cable Competition Report proceeding and in pending complaints. 9/ However, those comments also warn that other programming, including new regional channels, may be candidates for terrestrial distribution in the future. 10/

GE Americom recognizes that if terrestrial facilities are more efficient than satellites, then they deserve to win in the market. But we believe that the "satellite penalty" in the program access rules is driving the use of terrestrial networks even when such facilities are not the most efficient transmission choice. In short, the program access rules are no longer technology-neutral, as they were in 1992, because it is no longer the case that all relevant program services are

---

9/ *See, e.g., In the Matter of DirecTV, Inc., Complainant, v. Comcast Corp., Comcast-Spectator, L.P., and Comcast Sportsnet, Defendants*, Program Access Complaint, File No. CSR-5112-P (filed Sep. 23, 1997) ("*DirecTV Complaint*"). Cable competitors also have raised these objections at congressional hearings. *See, e.g., Communications Daily*, Oct. 9, 1997, at 8.

10/ *See, e.g., In the Matter of Annual Assessment of the Status of Competition in Market for the Delivery of Video Programming*, CS Docket No. 97-141 ("*1997 Cable Competition Report Docket*"), Comments of BellSouth Corp., *et al.*, filed July 23, 1997, at 15; Comments of the Wireless Cable Association International, Inc. at 7, 11; Ameritech Comments at 19; Bell Atlantic Comments at 6; Reply Comments of Bell Atlantic at 1; Reply Comments of GTE Service Corp. at ii, 5; Reply Comments of the National Rural Telecommunications Cooperative at 23.

necessarily delivered by satellite. The resulting "satellite penalty" distorts the network facilities market and violates the Commission's policy elsewhere of ensuring that its rules are "competitively neutral, "neither unfairly favor[ing] nor disfavor[ing] one technology over another." 11/

II. THE COMMISSION SHOULD TAKE IMMEDIATE ACTION TO MAKE THE PROGRAM ACCESS RULES TRANSMISSION TECHNOLOGY NEUTRAL.

A. The Rules Should Not Favor Any Transmission Medium.

The *Notice* asks whether the program access rules should apply when "a vertically-integrated programmer moves from satellite-delivered programming to terrestrially-delivered programming for the purpose of evading the program access rules." *Notice* at 22, ¶ 51. The Commission also asks whether the rules should apply to programming moved from satellites "based on the effect, rather than the purpose, of the programmer's action." *Id.*

GE Americom believes that there is a much cleaner and more direct path to correcting the satellite penalty in the access rules. The Commission should not engage in case-by-case review of the programmer's intent, or of the effect of its actions. Nor should analysis begin, as some complaints do, with an argument over whether a program service is really "new," or of whether it is an "old" service being moved from satellites.

11/ *See, e.g., In the Matter of Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8801, ¶¶ 46-47 (1997) (subsequent history omitted).

Rather, the Commission should correct the underlying problem by making the program access rules technology neutral in the first place. A program distributor's "satellite vs. terrestrial" decision should turn only on the inherent merits of each technology, including the relative costs and efficiencies of each transmission mode. It should not turn on whether one technology will trigger program access obligations and another will not.

GE Americom assumes that, in response to the *Notice*, the Commission will receive comments debating the scope of the access rules. Some will argue for broader MVPD access to programming; some will argue for less. GE Americom will review those proposals from the perspective of whether they will eliminate the irrational distinctions in the current rules between satellite and terrestrial facilities, and comment further as necessary on reply.

In addition, the Commission must immediately put parties on notice that the transmission technology neutral rules to be developed here will not allow "grandfathering" for terrestrially-delivered services. Such an announcement will minimize further market distortions while the rules are corrected by dissuading programmers from making "satellite vs. terrestrial" decisions based on program access considerations. Such an announcement also will allow the Commission to avoid later arguments from programmers that they relied on the current rules, irrational as they are, when deciding to bypass satellites for terrestrial networks.

B. The Commission Has Full Authority to Make the Access Rules Transmission Technology Neutral.

GE Americom submits that the competitive damage from the "satellite penalty" is not subject to dispute. However, the issue has been raised whether the Commission has the authority to fix the penalty itself.

A close reading of both the history of the Cable Act and the Commission's overall jurisdiction makes clear that the Commission need not sit idle in the face of this frustration of the public interest.

First of all, it is clear that Congress in no way intended to penalize satellite operators or advantage terrestrial network providers when it adopted the program access rules. That issue never arose. The debates simply assume that all relevant programming is distributed by satellite, and then discuss when access rules should apply and when exemptions should be available from those rules. Hence, eliminating the "satellite penalty" is consistent with Congressional intent. Indeed, to the extent that the arbitrary "satellite penalty" does anything, it interferes with the Commission's ability to advance other public interest considerations underlying the access rules.

Second, as a general rule the Commission has authority to adjust its rules to accommodate changes in technology, such as the developments that have introduced the "satellite penalty" since 1992. The Commission has broad authority under Section 4(i) of the Act, as amended, which provides that:

> [t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions. 12/

This provision has been interpreted broadly by the courts. In *United States v. Southwestern Cable Co.*, for example, the Supreme Court found with regard to the Commission's regulation of cable television that Section 4(i) conferred on the Commission the authority to adjust its regulations when needed to accommodate on-going changes in communications technology. 13/ That is what is happening here.

Third, the Cable Act itself provides an express statement of purpose for Section 548 giving the FCC the general obligation to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market." 14/ The "satellite penalty" is

---

12/ *Id.*

13/ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968). Similarly, the Court of Appeals for the District of Columbia Circuit has stated with respect to the Commission's regulation of cable television that where Congress in enacting a statute could not have "anticipate[d] the variety and nature of methods of communication by wire or radio that would come into existence, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry." *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966). Indeed, the Supreme Court has made clear with regard to the Commission's regulation of cable television services that the Commission has the authority to regulate "with a view not merely to protect but to promote the objective for which it has been assigned jurisdiction." *United States v. Midwest Video Corp.*, 406 U.S. 649, 667 (1972). The Court also has stated that "the avoidance of adverse effects is itself the furtherance of statutory policies." *Id.* at 664.

14/ 47 U.S.C. § 548(a). The section also is intended to increase program availability in rural areas and spur the development of communications technology.

inconsistent with this goal because it would make access obligations irrationally turn on transmission medium alone. The Commission has the ability to eliminate the satellite penalty in order to better meet the primary goals of the Act.

GE Americom recognizes that Section 19 of the Cable Act refers to application of the program access rules to "satellite cable programming" and "satellite broadcast programming." However, this language does not preclude the Commission from making the program access rules technology neutral based on current technological developments. First, Congress did not require that those terms be read as reaching only program services actually transmitted over a satellite space station. Close reading of the legislative history of the Act makes clear that, in light of the technology at the time, Congress viewed "satellite cable programming" as substantially synonymous with the generic category of "national and regional cable programming." This makes sense given that at the time all such programming could, as a practical matter, only be delivered by satellite.

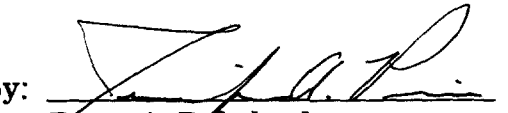
Second, and in any event, Congress gave the Commission the latitude to adopt rules to implement Section 548 that respond to the realities of an evolving marketplace. For example, to achieve transmission technology neutrality, the Commission need only waive access obligations for satellite-transmitted programming where access obligations would not apply if the program services was transmitted terrestrially.

CONCLUSION

GE Americom is not seeking an advantage for satellites. Rather, we are simply asking for elimination of the irrational distinction between satellite and terrestrial distribution technologies and with it the unfair disadvantage on satellites. For the reasons set forth above, the Commission can and should take immediate action to eliminate the satellite penalty, and the market distortions it creates, by making the program access rules transmission technology neutral.

Respectfully submitted,

GE AMERICAN COMMUNICATIONS, INC.

By: 

Peter A. Rohrbach
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Philip V. Otero
Senior Vice President and
General Counsel
GE American Communications, Inc.
Four Research Way
Princeton, NJ 08540

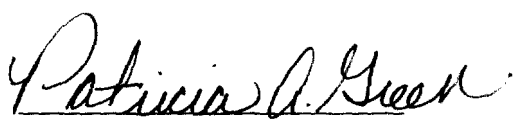
February 2, 1998

CERTIFICATE OF SERVICE

I, Patricia A. Green, hereby certify that on this 2nd day of February, 1998, copies of the foregoing "Comments of GE American Communications, Inc." were served by hand on the following:

Deborah Klein
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
7th Floor
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20037



Patricia A. Green